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IN THE

Supreme Court of the United States

October Term, 1959

No. 803

ABE GIDDINS and INTERSTATE DRESS CARRIERS, INC.,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Abe Giddins and Interstate Dress Carriers, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a judgment convicting petitioners of unlawfully suborning a witness to testify falsely before the Interstate Commerce Commission in violation of Title 18 U. S. C. §1622.

The Opinion Below

The opinion of the Court of Appeals is reported in 273 F. 2d 843. A copy thereof is set forth as an Appendix hereto.

Grounds of Jurisdiction

The judgment of the Court of Appeals was entered on January 18, 1960. Timely application for rehearing or for a stay of the mandate and continuance on bail was made on February 1, 1960. On February 19, 1960, the Court of Appeals denied rehearing, but granted the motion to stay the mandate and continued petitioner Giddins on bail pending the filing and determination of the petition herein.

The jurisdiction of this Court is invoked pursuant to Title 28 U. S. C. §1254(1).

Summary Statement of the Case

In June 1953, an examiner of the Interstate Commerce Commission held a hearing on the application of petitioner Interstate Dress Carriers, Inc. (hereafter called Interstate) to extend its garment trucking route between New York and certain southern states (R. 10a-11a). Eleven manufacturers and contractors appeared as witnesses in support of the application (R. 14a-15a). Their testimony, however, failed to show present or future necessity for extending Interstate's transportation service, and hence the application was denied (R. 17a-19a).

About five years after the hearing, petitioners were indicted on a charge of suborning one of the witnesses, Edward Kornfeld, to testify falsely at the hearing held on June 12, 1953. It was claimed that petitioner Giddins, president of Interstate, induced Kornfeld to testify falsely that he was the production and shipping manager of Gerson & Gerson, Inc. and that the company would utilize Interstate's transportation service if the application were granted (R.

4a-6a). In fact, Kornfeld was not employed by the Gerson company, but was in charge of production and shipping for Petite Frocks, Inc., which, it was claimed, had no need for the transportation service involved in petitioners' application (R. 51a, 60a, 61a).

To support the charge of subornation, the Government relied solely upon Kornfeld's uncorroborated assertion that he testified falsely before the examiner because petitioner Giddins asked him to say that he was the production and shipping manager for the Gerson company (R. 56a, 60a).

On behalf of the defense, petitioner Giddins admitted that he had asked Kornfeld to be a witness for Interstate, but denied that he had ever suggested or had any knowledge that Kornfeld would give any false testimony (R. 102a-118a), insisting that it was his understanding that Kornfeld would testify as production manager for Petite Frocks (R. 112a).

Five character witnesses testified that petitioner Giddins' reputation for truthfulness and honesty was beyond reproach (R. 97a, 100a-101a, 156a-160a).

The question of guilt or innocence turned, therefore, on the choice the jury would make between: (a) the uncorroborated word of Kornfeld, an admitted perjurer; and (b) the testimony of petitioner Giddins who had never been convicted of crime and whose denial of any wrongdoing was supported by an excellent reputation for truthfulness and honesty, attested to by uncontradicted character witnesses.

Questions Presented

1. When a character witness testifies that a defendant has an excellent reputation for truthfulness and honesty, does this Court's decision in *Michelson* v. *United States*, 335 U. S. 469, give the trial judge discretion to permit the following cross-examination without ascertaining whether there is a basis for the prosecutor's imputation of partnership in dope peddling and racketeering:

> "Q. Have you heard that the defendant Abe Giddins, the individual as to whom you have just testified, is the business partner of Harry Strasser, a convicted dope peddler, and the former business partner of the late Albert Anastasia" (R. 101)?*

2. Under this Court's decision in the *Michelson* case (*supra*), may a trial judge permit the unmistakable imputation of criminal association, inherent in the above quoted "have-you-heard" question, to be presented to a jury, despite the judge's knowledge, obtained in a private conference in chambers, that the prosecutor's question was based on a confidential FBI report allegedly indicating that the defendant was a former business partner of the named individuals "in a dress-contracting establishment" (R. 99a)?

3. If the wide discretion permitted in the *Michelson* case (*supra*) be stretched to encompass the kind of cross-examination quoted above, may it be further stretched to include a case where the trial judge:

---

* For many years "the late Albert Anastasia" was one of the most notorious gangsters and racketeers in the country. His recent assassination in a Manhattan barber shop received nationwide notoriety.

(a) failed to instruct the jury while overruling an objection to the prosecutor's question, that the alleged nefarious partnership was not to be considered as an actual fact, or to indicate the limited purpose for which such cross-examination may be considered, stating merely:

> "The Court: As I indicated, and the reason for my indication in chambers, I will allow it" (R. 101a);*

(b) informed defense counsel in denying a motion for a mistrial:

> "The Court: You have an exception. That is the best we can do under our system" (R. 120a);

(c) and four days later, in the charge to the jury, called attention to the fact that "there was no evidence" of the alleged partnership, that the character witness said he never heard of it (R. 214a), but preceded these remarks with this observation:

> "It may be that those with whom he (the defendant) had come in contact previously had been misled and that he did not reveal to them his true character" (R. 213a),

to which instruction an exception was taken (R. 216a)?

4. Was it "harmless error" for the prosecutor:

(a) to represent in the presence of the jury, without any basis whatever, that he was "prepared to prove" that petitioners committed a prior similar act of subornation of perjury (R. 144a-145a);

---

* The reason given in chambers was that since the defendant intended to testify in his own behalf, such cross-examination would become "part of the cross-examination in any event" (R. 99a-100a).

(b) to induce the court to rely on the representation and to receive in evidence an equivocal exhibit in expectation of further evidence (R. 149a-150a, 162a);

(c) to rest the Government's case without offering a single word of testimony to support this charge;

(d) and thereby compel petitioners to litigate a false issue and present substantial evidence (R. 168a-199a), which ultimately caused the court to instruct the jury to disregard everything "relative to that issue" (R. 214a)?

5. Is the uncorroborated word of the self-confessed perjurer sufficient in law to support the charge that petitioners suborned him to commit the perjury?

6. Upon conviction for subornation of perjury in a hearing before the Interstate Commerce Commission on an application for a certificate of convenience and necessity, may the court impose the penalty provided in the general subornation of perjury statute (Title 18, U. S. C. §1622) or is the court controlled by the penalty provided in Part II of the Interstate Commerce Act (Title 49, U. S. C. §322(a) and (c)?

Reasons for Granting the Writ

1.

In holding that the cross-examination of the character witness and the rulings of the trial judge in connection therewith do not constitute reversible error, the court below has decided questions of importance in the administration of criminal justice in a manner inconsistent with the decisions of this Court and contrary to the interests of justice.

The opinion of the court below, written by Judge Clark, states that consideration of the type of cross-examination conducted by the prosecutor "led Judge Frank in *United States* v. *Michelson*, 2 Cir., 165 F. 2d 732, to recommend that the Supreme Court consider limiting the permissible scope of cross-examination of character witnesses." The opinion also suggests that this Court's decision on certiorari, *Michelson* v. *United States*, 335 U. S. 469, rejecting the recommendation and investing the trial court with "wide discretion" to control the cross-examination, required the court below to sanction what happened in the case at bar.

The fact, however, is that this Court's decision in *Michelson* provided minimal standards of fairness to prevent the kind of cross-examination that was permitted here. Justice Jackson, writing for a majority of this Court, made it clear that trial courts had a duty to be on the alert to see that the "have-you-heard" cross-examination of a character witness was not abused, and that it was incumbent on prosecutors to be scrupulous in not stepping out of bounds on this sort of cross-examination. He emphasized that:

> "Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse" (335 U. S. at p. 480).

Justice Jackson further indicated the need for essential safeguards and made repeated note of the fact that in that case the trial judge "on three occasions warned the jury, in terms that are not criticized, of the limited purpose for which this evidence was received", stating at page 481:

> "The trial judge was scrupulous to so guard it in the case before us. He took pains to ascertain, out

> of the presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed *or asking a groundless question to waft an unwarranted innuendo into the jury box.*" (Emphasis added).

It is also not without significance that Mr. Justice Rutledge, with whom Mr. Justice Murphy joined, filed a strong dissenting opinion, and while Mr. Justice Frankfurter concurred in the Court's opinion, he did so "Despite the fact that my feelings run in the general direction of the views expressed by Mr. Justice Rutledge in his dissent" (335 U. S. at p. 487).

This Court's decision in *Michelson* is, therefore, to be regarded, in the words of the Court of Appeals for the Fifth Circuit, as marking "the extreme limits of permissible cross-examination." *Roberson* v. *United States,* 5th Cir., 237 F. 2d 536, 540.

Here, however, neither court nor prosecutor gave any heed to their responsibilities. The court made no attempt to ascertain while in chambers whether the unmistakable imputation of partnership in the nefarious activities of a convicted dope peddler and of a notorious gangster and racketeer were based on either rumor or fact. The court was content to rely on the prosecutor's unsupported assertion that he believed he could prove it (R. 98a-99a). When defense counsel insisted that the prosecutor "ought to satisfy the court that there is more to it than just a belief on his part", the prosecutor revealed that he relied on a

confidential FBI report allegedly indicating that petitioner Giddins was a former business partner of Strasser and Anastasia in a *"dress-contracting establishment"* (R. 99a).

But "in a dress-contracting establishment" was omitted by the prosecutor when he subsequently framed his "have-you-heard" question in the presence of the jury (R. 101a), for the obvious reason that being a business partner in a dress-contracting establishment with a person named Strasser and a person named Anastasia would not be incompatible with petitioner's excellent reputation for truthfulness and honesty.

It was only by omitting the key words, and by adding that Strasser was "a convicted dope peddler" and that Anastasia was "the late Albert Anastasia", that the prosecutor succeeded in conveying to the jury the suggestion that petitioner Giddins was a partner in dope peddling and racketeering. For this suggestion the prosecutor had no basis whatever, either in rumor or in fact.

The vice of the prosecutor's baseless imputation of partnership in crime apparently gave the court below some concern. Judge Clark's opinion states:

> "While the wording of the question taken by itself might suggest an inference that the reference was to a partnership in illegal endeavors, this was dispelled by the tenor of related questions and answers on direct and cross-examination of the defendant."

The difficulty with this clairvoyant assumption is that the prosecutor's question, if stripped of the inference of partnership in criminality or illegal endeavors, would have no bearing on the issue of petitioner's reputation for truthfulness and honesty. It would then be inadmissible as a

matter of law. Partnership in a *legitimate* dress-contracting establishment could not affect petitioner's reputation.

Judge Clark's ruling, therefore, necessarily means that an accused's good reputation for truthfulness and honesty may be impeached by relying on a confidential report that he was a business partner in a legitimate enterprise with other partners who were not to be trusted.

To permit this ruling to gain a foothold in the administration of criminal justice in our Federal courts would be to sanction the odious doctrine of guilt by association. As stated by Chief Judge Learned Hand in *United States* v. *Chiarella*, 2d Cir., 184 F. 2d 903, 911:

> "The excuse offered by the prosecution was that it was proper to show what kind of people the accused 'associates with', because he had called witnesses to prove his reputation for honesty. We know of no such doctrine, and no authorities are cited in its support; the question was improper and the prosecution should have known that it was."

A case directly in point is *State* v. *Keul*, 233 Iowa 852, 5 N. W. 2d 849, where the Supreme Court of Iowa held:

> "Rumors that certain named persons have committed assaults do not make their associates in lawful organizations persons of bad reputation. The test suggested by the cross-examination would destroy many good reputations. * * * Obviously, such inquiries should be limited to rumors which affect the reputation of the defendant. Inquiries about rumored acts which affect the reputation of third parties only are not a proper test of the extent of the information of the witness concerning the subject of his testimony or of the credibility of the witness in other respects."

The opinion of the court below also attempts to support its ruling with the statement that:

> "No cautionary instruction was requested at the time the question was posed, perhaps due to counsel's desire to avoid further emphasis on the matter. In the absence of such request, the instruction at the end of the trial sufficed."

The fact, however, is that counsel repeatedly objected to the prosecutor's question (R. 98a-101a), moved for a mistrial (R. 102a), and told the trial judge: "I do not know how to protect myself." In response to this complaint counsel was met with the following reply:

> "The Court: You have an exception. *That is the best we can do under our system*" (R. 120a; Emphasis added).

But this was not all. Four days later, in the charge to the jury, the court in speaking of character testimony said:

> "It may be that those with whom he (defendant Giddins) had come in contact previously had been misled and that he did not reveal to them his true character" (R. 213),

to which an exception was taken (R. 216a).

The court below quotes the charge immediately following the above quoted sentence, to the effect that "there was no evidence in this case that the defendant Giddins was a partner of either of these two men." But that observation did not modify, either expressly or impliedly, the earlier statement. There is a vast difference between an absence of evidence and an invitation to speculate that the defen-

dant may have misled the people he met to conceal his true character.

Viewing the facts in their totality, the decision of the court below breaks the limitations set by this Court in the *Michelson* case. The minimal safeguards therein provided have not been observed here. Instead, a dangerous precedent has been created which calls for this Court's supervisory control.

2.

As a witness in his own behalf, petitioner Giddins denied that he ever asked or induced Kornfeld to testify falsely (R. 111a-113a, 118a). To impeach this testimony the prosecutor represented in the presence of the jury that he was "prepared to prove" that Giddins or someone else acting on behalf of the corporation committed "a prior similar act" of suborning another witness, one Max Sawitz, to commit perjury at the hearing before the examiner (R. 144a-148a).

It cannot be too strongly emphasized that this highly prejudicial accusation was made without having the slightest basis to support it. Here again, the prosecutor resorted to the same unfair methods that he used on cross-examination of the character witness.

In the absence of the jury, the court ruled that "the prosecution is always allowed on the question of intent to show similar acts" (R. 145a-146a). Defense counsel urged the court not to accept the prosecutor's unsupported representation. He insisted that the prosecutor was guessing and had no proof, and that as a matter of law evidence of

similar crimes to prove intent was admissible only "where the intent does not flow from the act itself" (R. 146a-148a).*

The court, however, took the position that no offer of proof was necessary (R. 146a), that "a lawyer should be able to prove what he intends to prove" (R. 147a), and advised the prosecutor:

> "The Court: I am telling you it will boomerang so that it will bleed if it isn't true" (R. 148a).

Thereupon, the proceedings were resumed in the presence of the jury, where the court, relying on the prosecutor's representation, received in evidence a copy of a paper filed in the Corporation Commission's Office of Richmond, Virginia, in November, 1953, purporting to indicate that in June, 1953, Giddins, and not Sawitz, was the president of Colonial Fashions (Govt's Exh. 9, R. 149a-150a, 196a-197a).

Thereafter, the prosecutor rested the Government's case without offering a single word of testimony to support his charge of another subornation of perjury.

In these circumstances, defense counsel moved to strike Government's Exhibit 9 and requested appropriate instructions to the jury. The court, however, denied the motion to strike, stating in the absence of the jury:

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* Appellants raised no issue on the element of intent. The defense consisted of a flat denial that they asked or induced Kornfeld to commit perjury. In these circumstances, criminal intent would necessarily flow from a rejection of the defense and would need no additional support by evidence of an independent similar crime. *Fallen v. United States*, 5th Cir., 220 F. 2d 946, 948-949: "Proof of the commission of the act carried with it the evident implication of a criminal intent. In such instances, evidence of the perpetration of other like offenses is not needed to establish criminal motive or intent and is not admissible for such purpose."

> "The Court: I am going to tell the jury it didn't prove it (subornation of perjury). I will keep the exhibit in the record" (R. 161a).

The trouble with the court's ruling was that by refusing to strike Exhibit 9 petitioners were confronted with a Hobson's choice. If they failed to show that it was incorrect, the jury might infer that the prosecutor had some basis for his accusation that they committed a similar crime. If, on the other hand, they undertook to supply the evidence showing Exhibit 9 to be incorrect, they faced the problem of litigating a collateral issue created by a baseless accusation. In this dilemma, defense counsel, being unable to persuade the court to strike Exhibit 9, moved:

> "Mr. Gelb: As long as Exhibit 9 is in evidence, I ask you to reopen the case" (R. 164a).

Thereafter, a substantial part of the trial was devoted to the presentation of testimony and documentary proof through the attorney for Colonial Fashions, showing that in June, 1953, Max Sawitz was in fact president of that company (R. 168a-186a, Defts' Exh. C-J).

On cross-examination of the attorney the prosecutor continued with unfounded "Isn't-it-in-fact-true" questions (R. 187a, 193a), suggested that the attorney may be "lying" (R. 192a), and insinuated that Colonial Fashions was not operating until September, 1953 (R. 187a).

Here again, the opinion of the court below assumes that whatever harm may have been caused was "dispelled" by reason of the evidence produced by the defense and by reason of the charge to the jury.

It is respectfully urged that the wrong and the harm was that petitioners were forced to litigate a false and highly prejudicial issue. They could not permit the prosecutor's baseless accusation to remain uncontradicted. But this does not warrant the conclusion that thereby they "dispelled" the prejudice. In view of the fact that the real issue in the case turned upon the jury's choice between the uncorroborated word of an admitted perjurer and the word of the petitioner Giddins who had never been convicted of crime, it seems to us that if any assumption is to be made it must be one of irretrievable prejudice rather than of "harmless" error.

The instructions to the jury could not erase the prejudice created by the prosecutor's unfounded accusation; nor could they blot out the harm caused by the necessity to litigate a false issue. As stated by the Court of Appeals of New York in *People* v. *Smith*, 162 N. Y. 520, 530:

> "If the district attorney had the right to make the proof he proposed he did not make it, and thus may have prejudiced the defendant by a charge he could not or did not intend to support; if the district attorney had no right to make the proof then the charge, although no more harmful to the defendant, was a more reprehensible invasion of his rights."

3.

As heretofore noted, the Government's case rests solely upon Kornfeld's uncorroborated assertion that his wilfully false testimony before the examiner in June, 1953, was given at the behest of petitioner Giddins. There is not a word of independent testimony to lend support to his accusation.

It is submitted that the uncorroborated testimony of an admitted perjurer should be held, as a matter of law, to be insufficient to establish that he was induced by the accused to commit the perjury.

The question was expressly left open by this Court in *Hammer* v. *United States*, 271 U. S. 620, 629. Research fails to disclose any subsequent decision by this Court deciding the question. The courts of the State of New York refuse to permit such testimony to be the basis of a conviction. *People* v. *Evans*, 40 N. Y. 1.

The court below held that it "could see no reason to depart from the rule that the element of subornation, as distinguished from the element of perjury, is not subject to the requirement of corroboration."

It seems to us to be an anomaly to hold that the perjurer's uncorroborated testimony is not sufficient to establish his own guilt, and yet sufficient to establish the guilt of another.

The perjurer is not in the same position as the usual accomplice. Perjury is different. It destroys all foundation for belief. It vitiates everything it touches. Absent some corroborative evidence to create faith in the perjurer's accusation, a jury is placed in the stultifying position of finding that he is a wilful liar but a truthful accuser.

4.

Petitioner Giddins was sentenced to imprisonment for a year and a day, and petitioner Interstate was fined $2,000. These sentences were imposed under the general subornation of perjury statute. Title 18 U. S. C. §1622.

Petitioners urge that, upon conviction for subornation of perjury arising out of a hearing before the Interstate Commerce Commission on an application for a certificate of convenience and necessity, the proper punishment is that provided in Part II of the Interstate Commerce Act, commonly known as the Motor Carrier Act of 1935, 49 Stat. 543, as amended, 54 Stat. 919, 49 U. S. C., §301 *et seq.* Under this Act the maximum punishment for the offense charged is a fine of $100 under Section 322(a) or $500 under Section 322(c).

These penalties apply to the instant case by reason of the amendment in 1948 to the general perjury statute (Section 1621, Title 18, U. S. C.) which excludes the punishment there provided in cases where a different punishment is "otherwise expressly provided by law". By this amendment, Congress intended to prevent conflict with the perjury provisions in other titles, of which there are more than 25 in the Code, where different punishments are provided. See, Notes of the Revisers to Section 1621, Title 18, U. S. C.; Report of Committee on Revision of the Laws dated February 15, 1945, 79th Cong., 1st Sess., H. R. Nos. 152, 304.

Prior to the revision of the Criminal Code in 1948, the punishment for subornation was always incorporated by reference to the perjury section. Thus, former Section 232 of Title 18 provided that: "Whoever shall procure another to commit any perjury is guilty of subornation of perjury, *and punishable as in Section 231 of this title prescribed.*"

The only change made in the 1948 revision of the subornation section was to expressly provide for the same

punishment as perjury instead of doing so by reference. As stated by the Revisers Note to Section 1622:

> "The punishment prescribed in section 1621 of this title was substituted for the reference thereto.
>
> "Minor change was made in phraseology. 80th Congress House Report No. 304."

It is thus evident that there was no intent to exclude the punishment "otherwise expressly provided" in the various perjury provisions under other titles of the Code.

The court below held that it could "find no Congressional intent that the general prohibitions of 49 U. S. C. §322, dealing as they do with motor carrier regulation by the ICC and making no reference to perjury or subornation thereof, should supplant the specific proscription of perjury in 18 U. S. C. §1621."

There is, however, serious doubt whether the court below is correct. See, Senator Wheeler's report to the Senate of the hearings held before the Interstate Commerce Committee. With respect to Section 222 of the Motor Carrier Act (Section 322 of Title 49, U. S. C.) he said:

> "Section 222, page 60. Unlawful operation. This section provides penalties, in the way of fines only, for violations of the Act or the orders of the Commission and authorizes the issuance of injunctions or other judicial processes to enforce obedience." (Cong. Record, p. 5650, 74th Cong., 1st Sess., April 15, 1935).

And Commissioner Eastman, appearing before a subcommittee of the Interstate and Foreign Commerce Committee of the House of Representatives in May, 1938, on a

proposal to amend the Motor Carrier Act to strengthen enforcement, said:

> "• • • the law provides jail sentences for violation of Part I of the Act (dealing with railroads); but there are no jail sentences provided in the case of Part II (dealing with motor carriers)."

CONCLUSION

For the foregoing reasons we respectfully submit that a writ of certiorari be granted.

Respectfully submitted,

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March 18, 1960

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES DISTRICT COURT

FOR THE SECOND CIRCUIT

No. 146—October Term, 1959.

(Argued December 3, 1959 Decided January 18, 1960.)

Docket No. 25633

UNITED STATES OF AMERICA,

Appellee,

—v.—

ABE GIDDENS and INTERSTATE DRESS CARRIERS, INC.,

Defendants-Appellants.

Before:

CLARK, WATERMAN and MOORE,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge.*

Abe Giddins and Interstate Dress Carriers, Inc., appeal from their convictions of unlawfully suborning a witness to

testify falsely under oath before the Interstate Commerce Commission in violation of 18 U. S. C. §1622. Affirmed.

SOLOMON A. KLEIN, Brooklyn, N. Y. (Louis Bender, New York City, on the brief), *for defendants-appellants.*

DONALD H. SHAW, Asst. U. S. Atty., S. D. N. Y., New York City (S. Hazard Gillespie, Jr., U. S. Atty., and George I. Gordon and David Klingsberg, Asst. U. S. Attys., New York City, on the brief), *for appellee.*

CLARK, *Circuit Judge*:

These are appeals by Interstate Dress Carriers, Inc., and its president, Abe Giddins, from convictions after trial by jury of subornation of perjury in violation of 18 U. S. C. §1622. The perjury was committed by Edward Kornfeld at a hearing conducted by the Interstate Commerce Commission on the corporation's application to extend its trucking operations between New York and certain southern states. Kornfeld testified that he was the production and shipping manager of Gerson & Gerson, Inc., that the company had a sewing factory in Virginia, and that it would utilize Interstate's transportation services if the certificate were granted. In fact, Kornfeld had no connection with Gerson & Gerson, but was associated with Petite Frocks, Inc., which company had no need for the transportation services involved. Kornfeld had no interest

in Interstate, but he was related to Giddins through marriage and the two were frequent social companions.

The only direct testimony as to subornation was that of Kornfeld. Giddins admitted that he had requested Kornfeld to testify, but denied that he had induced or had known of the false statements. The resolution of this conflict depended upon an assessment of credibility—a matter clearly within the province of the jury. It is unnecessary to decide whether Kornfeld's testimony was corroborated, since we see no reason to depart from the rule that the element of subornation, as distinguished from the element of perjury, is not subject to the requirement of corroboration. *Cohen* v. *United States*, 2 Cir., 27 F. 2d 713; *Doan* v. *United States*, 9 Cir., 202 F. 2d 674. No question is raised as to the sufficiency of the quantum of proof on the element of perjury.

The principal assignments of error relate to questions posed by the government on the cross-examination of defendants' witnesses. The first character witness, Justice DiGiovanna of the New York Supreme Court, testified that he had known Giddins since 1940 and that the defendant had an excellent reputation in the community for truthfulness and honesty. On cross-examination the following question was allowed over vigorous objection:

> "Have you heard that the defendant Abe Giddins, the individual as to whom you have just testified, is the business partner of Harry Strasser, a convicted dope peddler, and the former business partner of the late Albert Anastasia?"

The response was negative.

Inquiry directed to a character witness' knowledge of disparaging rumors concerning an accused is almost universally permitted. 3 Wigmore on Evidence §988 (3d Ed. 1940). Such questions are relevant to test the familiarity of the witness with the reputation in question. Further, the defendant by voluntarily adducing evidence of his good reputation is foreclosed from objecting to evidence suggestive of the contrary. The practice has been cogently criticized, however, on the ground of the jury's inability to limit its consideration of such evidence to the issue of reputation. *Ibid.* This problem is aggravated where, as here, the answer is negative, and thus the inquiry is without probative significance unless others testify to the existence of such rumor or unless the witness' demeanor suggests that his denial is fabricated. But the assumption that a jury, even though instructed as to the immateriality of the exchange, will properly ignore it is doubtless based on unreality.

This consideration led Judge Frank in *United States* v. *Michelson*, 2 Cir., 165 F. 2d 732, to recommend that the Supreme Court consider limiting the permissible scope of cross-examination of character witnesses. On certiorari the Court in *Michelson* v. *United States*, 335 U. S. 469, 486, agreed "that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other." But it was recognized that "[b]oth propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record." *Id.* at 480. Thus the best practical solu-

tion was to be found in investing the trial court with wide discretion to control cross-examination. These rulings were to be disturbed by a Court of Appeals only "on clear showing of prejudicial abuse of discretion."

The Court did, however, provide protection from unwarranted innuendoes by requiring the trial judge to ascertain, out of presence of the jury, whether "the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation." *Id.* at 481. While the irrelevancy of this inquiry into the actual occurrence of the event was recognized, it was considered to be pragmatically justified. Here this procedure was followed by the trial court. Government counsel assured the court that FBI reports had revealed a business partnership of Giddins, Strasser, and Anastasia in a dress-contracting establishment. Counsel also remarked that the relationship had been the subject of comment in a newspaper story. With this showing of good faith by the government the allowance of the question cannot be deemed a prejudicial abuse of discretion. See *United States* v. *Alker*, 3 Cir., 260 F. 2d 135, 149, certiorari denied *Alker* v. *United States*, 359 U. S. 906; *Segal* v. *United States*, 8 Cir., 246 F. 2d 814, 820, certiorari denied 355 U. S. 894. While the wording of the question taken by itself might suggest an inference that the reference was to a partnership in illegal endeavors, this was dispelled by the tenor of related questions and answers on direct and cross-examination of the defendant.

In its charge at the end of the trial the court advised the jury as follows:

> "In this connection the Government was permitted by me to ask one of the witnesses whether he had heard that the defendant was a partner of Anastasia and Strasser. The witness said that he never did. I permitted this because the witness testified concerning the defendant's reputation and we all know that reputation is the sum total of what we hear about people, and that is why the question was relevant. But I must add that there was no evidence in this case that the defendant Abe Giddins was a partner of either of these two men, and certainly the mere asking of the question doesn't prove that he was.
>
> "In fact, I charge you specifically that there was no evidence in the case connecting the defendant Abe Giddins with either of these two men in any partnership relationship whatsoever."

This instruction was a proper statement of the law. No cautionary instruction was requested at the time the question was posed, perhaps due to counsel's desire to avoid further emphasis on the matter. In the absence of such request, the instruction at the end of the trial sufficed. *See Malatkofski* v. *United States*, 1 Cir., 179 F. 2d 905, 914.

Objection is also raised to the government's representation on cross-examination of Giddins that it was prepared to prove that he or someone else on the part of Interstate had committed a prior similar act of suborning another witness, Max Sawitz. Sawitz had testified at the ICC hearing in June 1953 that he was President of Colonial Fashions, Inc. When Giddins denied that this testimony was false, the government introduced a copy of a report by Colonial to the Virginia Corporation Commission which indicated that Giddins was its president from November

1952 to November 1953. The admission and refusal to strike this exhibit is objected to on the ground that it constituted impeachment on a collateral matter.

The defense was permitted, however, to reopen its case and demonstrate via corporate minutes, the corporate lease, payroll checks, and promissory notes that the report was erroneous, Giddins having been elected president of Colonial upon the resignation of Sawitz in September 1953. Any remaining doubts in the jury's mind would have been dispelled by the following instruction: "When the defendant Giddins was on the stand an issue developed on cross-examination as to whether or not Sawitz testified truthfully or falsely before the ICC examiner when he testified that he was president of Colonial Dress Company. The Government was permitted to go into this collateral issue on its representation that it intended to prove that the defendant Giddins suborned Sawitz's testimony and that it was false. The Government utterly failed in this connection and offered no testimony or no proof that the defendant Giddins had anything to do with Sawitz's testimony, or that he knew that he lied, if in fact he did. All of the testimony relative to that issue should be disregarded by you, since the Government completely failed in its intended proof." Thus the error, if any, in the pursuance of this inquiry can only be deemed harmless. Fed. R. Crim. P. 52; *cf. United States* v. *Novick*, 2 Cir., 124 F. 2d 107, 109, certiorari denied *Novick* v. *United States*, 315 U. S. 813.

The remaining issue involves defendants' contention that sentence should have been imposed under §222(a) or (c) of the Motor Carrier Act of 1935, 49 U. S. C. §322(a, c),

rather than under 18 U. S. C. §1622. Giddins was sentenced to imprisonment for a year and a day, and Interstate was fined $2,000. The maximum penalty under 49 U. S. C. §322(a) at that time was a fine of $100, and under 49 U. S. C. §322(c) a fine of $500.[1]

18 U. S. C. §1622 provides in unambiguous language:

> "Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

The assertion that this provision is inapplicable is grounded on the fact that the maximum punishment for perjury under 18 U. S. C. §1621 is a fine of $2,000 and five years' imprisonment, "except as otherwise expressly provided by law." It is argued that perjury and subornation are substantially the same offense, and thus the savings clause of 18 U. S. C. §1621 should be read into §1622. *Cf. Epstein* v. *United States*, 7 Cir., 196 F. 354. Prior to the 1948 revision of the Criminal Code, the punishment for subornation was prescribed to be that imposed for perjury. The Reviser's Note to 18 U. S. C. §1622 merely states that "[t]he punishment prescribed in Section 1621 of this title was substituted for the reference thereto."

But it is unnecessary to decide this point, since we find no Congressional intent that the general prohibitions of

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[1] By amendment of Aug. 14, 1957, to 49 U. S. C. §322(a) and (c) the penalties under (a) have been increased to $100-500 for a first offense and $200-500 for subsequent offenses, while the penalties under (c) have been increased to $200-500 for a first offense and $250-2,000 for subsequent offenses.

49 U. S. C. §322, dealing as they do with motor carrier regulation by the ICC and making no reference to perjury or subornation thereof, should supplant the specific proscription of perjury in 18 U. S. C. §1621. The prohibition of 49 U. S. C. §322(c) against seeking by any means "to evade or defeat regulation as in this chapter provided" is in marked contrast to the specific reference to perjury found in other sections of the United States Code.[2] Further, in reference to a recent amendment to §322, Congress noted that subsection (a) relates "to violations of motor carrier safety regulations," and subsection (c) "to rebates and unlawful competitive practices." H. R. Rep. No. 877, 85th Cong., 1st Sess., 1957 U. S. Code Cong. & Adm. News 1467-68. We thus conclude that sentencing under 18 U. S. C. §1622 was proper.

Judgment affirmed.

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[2] *E. g.*, 5 U. S. C. §789; 13 U. S. C. §213; 26 U. S. C. §§6065, 7206; 38 U. S. C. §787; 46 U. S. C. §§170(13), 787. See also 16 U. S. C. §371; 22 U. S. C. §703; 46 U. S. C. §22.

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No. 803

In the Supreme Court of the United States

OCTOBER TERM, 1959

ABE GIDDINS AND INTERSTATE DRESS CARRIERS, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 20–28) is reported at 273 F. 2d 843.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1960 (R. 254). A petition for rehearing was denied on February 19, 1960 (R. 272). The petition for a writ of certiorari was filed on March 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence of subornation of perjury was sufficient.

2. Whether a character witness was properly cross-examined, and the jury properly charged thereon.

3. Whether there was prejudicial error in the introduction of certain records during the cross-examination of a petitioner.

4. Whether petitioners should have been charged under a general section of the Interstate Commerce Act, rather than under the subornation of perjury statute.

STATUTES INVOLVED

18 U.S.C. 1622 provides:

> Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

Section 222 of the Interstate Commerce Act, 49 Stat. 564, 49 U.S.C. (1952 ed.) 322 (prior to the 1957 amendment, provided:

> (a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

* * * * *

(c) Any person, whether carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give, or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this part, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully assist, suffer or permit any person or persons, natural or artificial, to obtain transportation of passengers or property subject to this part for less than the applicable rate, fare, or charge, or who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this part provided for motor carrier or brokers, shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than $500 for the first offense and not more than $2,000 for any subsequent offense.

STATEMENT

The petitioners were convicted in the District Court for the Southern District of New York of the willful subornation of perjury of one Edward Kornfeld who had testified in behalf of petitioners at a hearing before the Interstate Commerce Commission (R. 4–6, 217). Petitioner Giddins was sentenced to imprisonment for a year and a day and the corporation was fined $2,000 (R. 218).

A. THE SUBORNATION OF PERJURY

The evidence at petitioners' trial was as follows: Petitioner Abe Giddins was president of Interstate Dress Carriers, Inc., which had made an application to the I.C.C. for authority to transport garments and materials between New York and certain southern states (R. 4). An I.C.C. hearing was held in June 1953, because of protests that there was no need for the proposed service of Interstate in the southern area (R. 11). All witnesses for petitioners, except Kornfeld and Sawitz, testified, not to a present need for transportation service, but to the future possibility of establishing factories in the south which would have such need (R. 15). Kornfeld committed perjury at the hearing by stating that he was employed by Gerson & Gerson, Inc., a manufacturer of children's dresses, in charge of transportation (R. 15–16), whereas, in truth, Edward Kornfeld was a partner in Petite Frocks (R. 50) and had never been employed by Gerson & Gerson (R. 60). The perjury was admitted by Kornfeld (R. 60, 82, 86) and corroborated by employees of Gerson & Gerson (R. 24, 36, 42) and by Kornfeld's partner in Petite Frocks (R. 27).

Kornfeld testified at petitioners' trial that he had been a friend of petitioner Giddins for approximately eighteen years (R. 52). About a month or two before the I.C.C. hearing, Giddins had called Kornfeld and asked him to appear as a witness "for Gerson & Gerson" (R. 56). When Kornfeld asked why, Giddins said that Gerson would not supply a witness because they were "peeved" over a business transaction (R.

57). Giddins told Kornfeld that it was necessary to mention Gerson & Gerson because that concern was dealing with a factory in Virginia at the time of the hearing (R. 58). Kornfeld agreed to testify (R. 58) and met Giddins at the appointed time outside the hearing room. Giddins explained the procedure and told Kornfeld to say that he worked for Gerson & Gerson as a production man and shipping manager (R. 59–60).

Kornfeld further testified that, in 1956, when he was interviewed about his testimony by an I.C.C. investigator, Kornfeld said that he worked for Gerson & Gerson (R. 63–64, 65). Kornfeld reported this to the petitioner corporation and then met with their lawyer (R. 64). After a second interview with the I.C.C. investigator, Kornfeld decided to get his own lawyer (R. 65). In 1958, Giddins met Kornfeld by appointment and inquired what Kornfeld intended to do in response to a subpoena from the district attorney's office. Kornfeld told petitioner that Kornfeld's attorney had advised him to tell the truth (R. 68). Giddins said that this would not be necessary, since nothing could be done if Kornfeld did not go to the district attorney. Giddins said that he was trying to have the testimony stricken from the case (R. 68–69).

Giddins testified at the criminal trial in his own behalf. He admitted that he asked Kornfeld to testify (R. 130), but claimed he did not ask Kornfeld to give perjured testimony (R. 112).

In denying a motion to dismiss for failure of proof, the trial judge held that the government had proved perjury as required, and had made a *prima facie* case

of subornation (R. 95–96). He later charged the jury that perjury had to be proved by two witnesses, but not the subornation (R. 210–211). The court of appeals held that there was no necessity to decide whether the subornation was corroborated since there was no "reason to depart from the rule that the element of subornation, as distinguished from the element of perjury, is not subject to the requirement of corroboration" (Pet. App. 22).

B. CROSS-EXAMINATION OF CHARACTER WITNESSES

Petitioner Giddins presented five character witnesses (R. 97, 156, 157, 159, 160). Prior to the government's cross-examination of one character witness, an offer of proof was made outside the presence of the jury. The government stated that, in order to test whether the witness was qualified to testify as to character, he would be asked whether he knew of the petitioner's association as a "business partner in several corporations of the late Albert Anastasia" and "Harry Strasser, who is a convicted dope peddler" (R. 98). Petitioner's attorney responded (R. 98):

> This defendant is going to take the stand and he is going to testify that neither Anastasia nor Strasser has ever been a partner of—.

The trial judge said that he would allow the question if the government was prepared to prove its basis for the question. The government attorney stated that the question was based on an F.B.I. report in his file that there was such a partnership in at least one dress-contracting establishment (R. 99).

The trial judge observed that the issue to be decided was whether the suggested inquiry was proper and

whether it was too prejudicial, to which petitioner's counsel agreed (R. 99). Then the judge noted (R. 99-100):

> The COURT. You say that the man is going to testify?
>
> Mr. GELB [Petitioner's trial counsel]: He is.
>
> The COURT. Then I take it that this will be part of the cross-examination in any event.
>
> Mr. GELB. That's right.
>
> The COURT. Under those circumstances you may have an exception to the question and I will allow it.

When asked the question, the character witness responded negatively and the government asked no further questions (R. 101). During his testimony, petitioner Giddins denied that he was a partner of Strasser and claimed his only dealings with Anastasia were in connection with transporting garments to a factory owned by Strasser and Anastasia (R. 104). On cross-examination, he admitted that Strasser was in petitioner's office "last week"—"[m]aybe five, six, ten" times (R. 122).

The trial court charged the jury (R. 214):

> * * * there was no evidence in this case that the defendant Abe Giddins was a partner of either of these two men, and certainly the mere asking of the question doesn't prove that he was.
>
> In fact, I charge you specifically that there was no evidence in the case connecting the defendant Abe Giddins with either of these two men in any partnership relationship whatsoever.

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The court of appeals found that the trial court had protected the petitioners against unwarranted innuendoes, that any suggestion as to illegal activities was dispelled by the "tenor of related questions and answers," and that since petitioner made no request for a cautionary instruction at the time, the instruction at the end of the trial was sufficient (Pet App. 24–25).

C. CROSS-EXAMINATION OF PETITIONER GIDDINS

During the cross-examination of petitioner Giddins (R. 120–153), the following ensued (R. 144):

> Q. Isn't it in fact true that Max Sawitz lied when he said that, at least as of June, 1953, he was the president of Colonial Fashions?
>
> A. No, he didn't lie. He was the president, I believe.[1]
>
> Mr. GELB. If your Honor please, I object to that as not proper cross.
>
> The COURT. I wouldn't believe it is. The witness has already answered. What do I do, strike his answer or what?
>
> Mr. GELB. Well, let it stand.

The government counsel then asked the petitioner:

> Isn't it in fact true that you were the president of Colonial Fashions in Petersburg, Virginia?

When objection was made, government counsel informed the court that the question was designed to establish a prior similar act (R. 144). Petitioners' counsel then asked that the jury be instructed to dis-

[1] This has reference to the testimony of Sawitz at the same I.C.C. hearing where Kornfeld committed perjury (R. 142–143). For the testimony of the other witnesses at the I.C.C. hearing, see *supra*, p. 4.

regard the question. In response, the trial judge stated (R. 145):

> Yes, I will instruct the jury, but I am not too clear what counsel wants to do. We are all agreed that he can prove, if he is able, a similar act, and by a similar act we mean suborning.

Thereafter, petitioner Giddins was asked whether he had made out a $60,000 check to Colonial Fashions, Petersburg, Virginia, and he answered that he did not know (R. 149). The government then offered Exhibit 9 consisting of a report filed in the Corporation Commission's Office in Virginia tending to show that Giddins was president in 1953 (R. 149–150; Govt. Ex. 9).[1] Petitioners' counsel objected to its receipt in evidence on the ground that it was without probative value, but the trial judge admitted it (R. 150). On redirect examination Giddins stated that he had invested in the company, and testified that he believed that Sawitz was president (R. 154–155). On recross-examination, the government asked one question (R. 155):

> Q. Is it your testimony before this jury that you were the president of a corporation, in which you had a $60,000, or Interstate had a $60,000 interest, and you didn't know about it?
>
> A. Sure; happens every day.

After the close of petitioners' case, further objection was made that Exhibit 9 did not prove anything (R. 161). Petitioners' counsel also asserted that the facts reflected therein were not accurate (R. 162–163). The judge permitted the case to be reopened

[1] We have lodged with the Clerk the certified transcript and other related documents used in the court of appeals, including a certified copy of government Exhibit 9.

and petitioners' counsel offered, without objection, defendants' Exhibit A, which was a certificate filed in Virginia, dated 1952, signed by Sawitz as president (R. 167–168). Petitioners also offered Samuel Schaeffer, attorney for Colonial Fashions in 1953 (R. 168–199), who testified that a Virginia lawyer formed the corporation (R. 168) and that the minute book reflected that Sawitz resigned as president on September 2, 1953, when Abe Giddins was elected president (R. 169). He identified a number of documents, which the court allowed in evidence, which showed the signature of Sawitz as president in November 1952 and in 1953 (R. 172–173, 175, 177–180, 183). He did not know who had prepared government Exhibit 9 and defendants' Exhibit A (R. 194–195).

The judge told counsel that he would tell the jury that there was no proof that Giddins suborned the testimony of Sawitz, but that he thought the exhibits had some relevancy to the credibility of Giddins as to whether or not he was president at a certain time (R. 200). In the charge, however, the judge went further. He said (R. 214):

> When the defendant Giddins was on the stand an issue developed on cross-examination as to whether or not Sawitz testified truthfully or falsely before the I.C.C. examiner when he testified that he was president of Colonial Dress Company. The Government was permitted to go into this collateral issue on its representation that it intended to prove that the defendant Giddins suborned Sawitz's testimony and that it was false. The Government utterly failed in this connection and offered no testimony or no

> proof that Giddins had anything to do with Sawitz's testimony, or that he knew that he lied, if in fact he did. All of the testimony relative to that issue should be disregarded by you, since the Government completely failed in its intended proof.

The court of appeals therefore held that, even assuming the trial court erred in allowing the government to pursue this inquiry into Sawitz' testimony, the error was rendered harmless (Pet. App. 26).

ARGUMENT

1. The petitioners contend (Pet. 15–16) that this case rests on the uncorroborated testimony of one witness, Kornfeld, and that as a matter of law this should be deemed insufficient. This is incorrect both factually and legally.

Factually, the circumstances surrounding the subornation—motive on Giddins' part and lack of motive for Kornfeld to lie except friendship with Giddins—are consistent with and corroborated Kornfeld's testimony. Furthermore, Giddins admitted that he asked Kornfeld to testify (R. 111, 130) and met him outside the hearing room (R. 131). And Kornfeld's testimony that Giddins told him that he was going to try to get his testimony stricken is corroborated by the documentary evidence of a letter written to the I.C.C. to that effect (R. 70–71).

The judge did not, however, require the jury to find corroboration of the subornation, so that the legal issue of whether such corroboration is required is presented by this record. The rule is that while it is necessary to prove the falsity of the testimony by two

independent witnesses or one such witness plus corroborating circumstances (*Hammer* v. *United States*, 271 U.S. 620)—proof which was admittedly offered here—the element of subornation, as distinguished from the element of perjury, is proved, like the elements of all other crimes, by proof beyond a reasonable doubt. *Segal* v. *United States*, 246 F. 2d 814 (C.A. 8), certiorari denied, 355 U.S. 894; *Catrino* v. *United States*, 176 F. 2d 884 (C.A. 9); *Doan* v. *United States*, 202 F. 2d 674, 678 (C.A. 9); *Cohen* v. *United States*, 27 F. 2d 713 (C.A. 2); *United States* v. *Silverman*, 106 F. 2d 750 (C.A. 3); see *Caminetti* v. *United States*, 242 U.S. 470, 495; *Outlaw* v. *United States*, 81 F. 2d 805 (C.A. 5), certiorari denied, 298 U.S. 665. There is no reason why the perjury rule should be applied to the subornation aspect. As explained by this Court in *Weiler* v. *United States*, 323 U.S. 606, 609, the special perjury rule stems from the need to give witnesses special protection and the fact that "equally honest witnesses may well have differing recollections of the same event." These considerations do not apply to subornation any more than to any other criminal charge.

2. In a series of three questions with related subdivisions, petitioners strive (Pet. 4–5) to emphasize the scope and influence of the cross-examination as to Giddins' association with Strasser and Anastasia. The fact is that only one question was asked; it was asked of only one character witness out of five who testified; it was preceded by a statement by the government outside the hearing of the jury giving the basis for the question; and petitioners' counsel volunteered that

petitioner Giddins would take the stand so that the question would be proper on cross-examination. Moreover, the final charge clearly told the jury that "there was no evidence in this case" connecting Giddins with Strasser or Anastasia in a partnership (*supra*, p. 7).[3]

The trial judge appropriately weighed any possible prejudice in the light of the government's basis for the question and the fact that the information would come out in any event during cross-examination of Giddins (*supra*, p. 7). When petitioner Giddins opened up inquiry as to his reputation, the law "subjects his proof of tests of credibility designed to prevent him from profiting by a mere parade of partisans." *Michelson* v. *United States*, 335 U.S 469, 479; see *Segal* v. *United States*, 246 F. 2d 814, 819–820 (C.A. 8), certiorari denied, 355 U.S. 894; *United States* v. *Alker*, 260 F. 2d 135 (C.A. 3), certiorari denied, 359 U.S. 906. The trial judge scrupulously guarded against any misuse by the jury by giving proper instructions. Since only one question was asked and there was no request for an immediate limiting instruction, the instructions actually given were clearly sufficient. See *Malatkofski* v. *United States*, 179 F. 2d 905, 914 (C.A. 1).[4] At the least,

[3] Petitioner admitted seeing Strasser frequently and doing trucking for Strasser and Anastasia (R. 122, 104).

[4] Petitioners contend (Pet. 5, 11) that the instructions were erroneous since, besides telling the jury that there was no evidence to connect Giddins with Strasser or Anastasia, the court stated (R. 213): "It may be that those with whom he [Giddins] had come in contact previously had been misled and

petitioners have not made such a "clear showing of prejudicial abuse of discretion" as to justify an appellate tribunal in disturbing the trial court's rulings on the scope of cross-examination. *Michelson* v. *United States, supra,* 335 U.S. at 480.

3. Petitioners complain (Pet. 12–15) of the introduction into evidence of government Exhibit 9 during the cross-examination of petitioner Giddins. See the Statement, *supra,* pp. 8–11. The facts in context show that this contention is without merit.

Except for Kornfeld and Sawitz, all petitioners' other witnesses at the I.C.C. hearing testified only generally as to the future possibility of establishing factories in the south needing transportation service (R. 15). The government asked petitioner Giddins on cross-examination whether Sawitz had lied in June 1953 when testifying that he, Sawitz, was president of Colonial Fashions, Giddins answered that Sawitz had not lied. Petitioners' counsel agreed that this question and answer could stand (R. 144). The govern-

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that he did not reveal to him his true character." But the court did not make this statement with regard to Giddins' relationship with Strasser and Anastasia. Instead, it immediately followed and properly explained an instruction that, while character evidence should be considered together with "all the other evidence in the case in determining the guilt or innocence" of petitioner Giddins, such evidence is not alone controlling: "But if from all the evidence you are satisfied beyond a reasonable doubt that the defendant Abe Giddins is guilty, a showing that the defendant previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit a defendant merely because you believe he had been a person of good repute" (R. 213). See *Edgington* v. *United States*, 164 U.S. 361.

ment next asked Giddins whether he was in fact the president of Colonial Fashions. This question was never answered.

The government introduced Exhibit 9, a document which had been filed with the Virginia Corporation Commission's Office by Colonial Fashions, Inc., and indicated that Giddins, not Sawitz, was president in 1953. The government then dropped the matter. On redirect examination, however, Giddins confirmed the fact that he had invested $60,000 in Colonial Fashions and testified that he believed Sawitz was president (R. 154–155). On recross-examination, Giddins was asked whether he could not have known that he was president of a corporation in which he had invested $60,000. Giddins responded that it "happens every day" (R. 155).

When petitioners complained that the facts—which appeared in a public document filed by the corporation—were untrue, the judge gave petitioners an opportunity to reopen the case. There was no surprise, as the petitioners were clearly prepared and did offer considerable proof, both documentary and oral, in opposition to the government's evidence on this issue. The trial judge also informed petitioners' counsel that the jury would be instructed that the government had not proved that Giddins had suborned Sawitz. He properly refused, however, to order the exhibit stricken since the exhibit tended to impeach the credibility of Giddins.

The trial court clearly directed the jury to disregard the entire evidence on this matter (*supra*,

pp. 10–11). Thus, as the court of appeals held, the error, if any, was harmless (Pet. App. 26). Moreover, this instruction was actually more favorable to petitioners than was required since petitioners' interest in the only other company which claimed existing southern transportation needs at the hearing, tended, not only to impeach Giddins, but to establish the motive for the subornation of Kornfeld. Petitioners are therefore in no position to claim prejudice.

4. Petitioners claim (Pet. 16–19) that they should be punished under the provisions of Section 222 of the Interstate Commerce Act (see *supra*, pp. 2–3) since the perjury which was the basis of the subornation occurred in an I.C.C. hearing. They argue that the phrase "except as otherwise expressly provided by law" which is in the perjury statute (18 U.S.C. 1621) should be read into the subornation statute (18 U.S.C. 1622, *supra*, p. 2) because the crimes are similar. The answer is twofold. First, Congress did not see fit to include that language in the subornation statute and petitioners point to no legislative history substantiating their argument. Second, even if the exception clause were read into the subornation statute, neither perjury nor subornation penalties are "expressly" provided in the Interstate Commerce Act and therefore petitioners could be properly charged under 18 U.S.C. 1622.[5] The penalties under the Interstate Commerce Act—limited to fines—are general in terms and nowhere expressly cover subornation.

[5] In contrast, numerous other statutory provisions expressly provide penalties for perjury. See, *e.g.*, 5 U.S.C. 789; 13 U.S.C. 213. It was doubtless such provisions as these to which the general perjury statute was intended to defer.

Not only does Section 222 not expressly provide for punishment for perjury but its provisions contemplate entirely different offenses. In reference to the 1957 amendment to Section 222 (which merely increased the penalties), Congress noted that subsection (a) relates to "motor carrier safety violations" and subsection (c) to "rebates and unlawful competitive practices." H. Rep. No. 877, 85th Cong., 1st Sess., p. 1. This description is fully supported by the language of the statute.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1960.

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[6] In *United States* v. *Noveck*, 273 U.S. 202, the claim was made that Congress must have intended that perjury in making tax returns should be punished under the Revenue Act and not under the criminal code. This Court unanimously rejected this conclusion. See also *United States* v. *Beacon Brass Company*, 344 U.S. 43.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 803

ABE GIDDINS and INTERSTATE DRESS CARRIERS, INC.,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

1.

In view of the government's evasive brief submitted in opposition to the petition for certiorari, it is essential to again quote the precise question propounded by the prosecutor to Justice Di Giovanna of the New York Supreme Court who appeared as a character witness for petitioner Giddins:

> "Q. Have you heard that the defendant Abe Giddins, the individual as to whom you have just testified, is the business partner of Harry Strasser, a convicted dope peddler, and the former business partner of the late Albert Anastasia" (R. 101a).

The vice of this question was: (a) that it was a baseless imputation of partnership in the nefarious activities of a convicted dope peddler and of a notorious gangster and racketeer, and (b) that both court and prosecutor knew that these sinister imputations of criminality were the product of sheer suspicion emanating solely from an illegal partnership "in a dress-contracting establishment" (R. 99a).

The government's brief (pp. 6, 12) asserts that "an offer of proof was made outside the presence of the jury" and that the question propounded in the courtroom "was preceded by a statement by the government outside the hearing of the jury giving the basis for the question".

The fact, however, is that there was no basis whatever for the sinister imputations of partnership in crime which were unmistakably conveyed by the prosecutor's question.

To appreciate the unfairness of the tactics used, it is necessary to view the events in their true setting. To begin with, the prosecutor announced in the presence of the jury: "Your Honor, I have an offer of proof and I wish to do this out of the presence of the jury" (R. 97a-98a). Thereupon, the jury were kept in suspense while a conference was held in chambers, where the prosecutor requested that he be permitted to ask whether the witness had heard that petitioner "was the former business partner *in several corporations* of the late Albert Anastasia and an individual by the name of Harry Strasser, who is a convicted dope peddler" (R. 98a).

When objection was made that "any such question is calculated to inflame the jury without any foundation what-

ever", the court made no attempt to ascertain whether there was a basis for the proposed question. The record shows:

> "The Court: Be that as it may, I think the question is proper if the Government proves it. I can tell you now that I will ask you at the time you ask the question whether you intend to prove that as a fact or prove that as a rumor.
>
> Mr. Shaw: I believe that I can prove it as a rumor and as a fact.
>
> The Court: That is all I will ask you" (R. 98a-99a).

And when defense counsel insisted that the prosecutor "ought to satisfy the court that there is more to it than just a belief on his part," the prosecutor let the cat out of the bag by revealing that he relied on a confidential FBI report in his file allegedly indicating that petitioner was "the former business partner of Albert Anastasia and Harry Strasser in at least one *dress-contracting establishment*" (R. 99a).

The question propounded in the courtroom, however, omitted any reference whatever to an alleged partnership "in a dress-contracting establishment" or "in several corporations"; thereby conveying the thoroughly baseless inference that petitioner was a partner in dope peddling and racketeering. Defense counsel, therefore, objected to the question upon the ground that there was "utterly no foundation for it" and that it "was calculated to inflame the jury" (R. 101a). The court, however, without giving any limiting instruction to the jury, overruled the objection with the cryptic observation:

> "The Court: As I indicated, and the reason for my indication in chambers, I will allow it. You have an exception" (R. 101a).

And when defense counsel tried to impress upon the court the seriousness of the prejudice created by allowing the question, the court replied:

> "The Court: You have an exception. That is the best we can do under our system" (R. 120a).

It would be cynical, indeed, to say that the prejudice engendered is the price an accused must pay for offering proof of his good character for truthfulness and honesty. The law exacts no such price. The prosecutor had, of course, a right "to test the qualifications of the witness to bespeak the community opinion" by asking the witness whether he heard of specific acts of misconduct incompatible with the character vouched for on direct examination. *Michelson* v. *United States*, 335 U. S. 469, 483-484. But this did not give him a license to condemn the accused by sinister innuendo and unfounded accusation. In the words of Justice Jackson in the *Michelson* case, at page 481, the prosecutor may not propound "a groundless question to waft an unwarranted innuendo into the jury box."

It must be remembered that the jury did not know what the prosecutor's "offer of proof", made in their absence, really disclosed. They were not told that suspicion of partnership "in a dress-contracting establishment" was the sole prop upon which the prosecutor framed his question. It is fair to say that the jury had confidence that the court would not permit the sinister imputations of partnership with a dope peddler and a notorious gangster to be presented to them, if the "offer of proof" did not supply some

basis for the imputations. This was undoubtedly reinforced by the court's charge to the jury four days later that the prosecutor's question "was relevant" (R. 214a), which instruction was immediately preceded by the gratuitous charge that:

> "It may be that those with whom he (petitioner) had come in contact previously had been misled and that he did not reveal to them his true character" (R. 213a).

2.

The government's brief attempts to argue that in the conference in chambers petitioners' counsel in effect waived his objections. We are told that "petitioners' counsel volunteered that petitioner Giddins would take the stand so that the question would be proper on cross-examination" (Govt's Br. pp. 12-13).

This is indeed an amazing assertion. The clipped excerpt quoted at page 7 of the government's brief has been wrenched out of context. It ignores the vehement and repeated objections that the prosecutor's question was "without any foundation whatever" (R. 98a), that it was "so inflammatory that it deprives the defendant of an opportunity of a fair trial" (R. 100a), and that it was "calculated to inflame the mind of the jury against this defendant" (R. 101a). It also ignores the motion for a mistrial (R. 102a).

To say in the face of these unimpeachable facts that petitioners' counsel volunteered "that the question would be proper on cross-examination" of petitioner, who intended to take the witness stand, is indicative of the lack of merit

to the governmennt's opposition to the granting of certiorari.

3.

As to the prosecutor's thoroughly baseless and highly prejudicial representation that he was prepared to prove another subornation of perjury and his offer of Exhibit 9 purporting to support his accusation, the government seeks to have the error excused as harmless. It argues that petitioners were given the opportunity to reopen the case and that

> "There was no surprise, as the petitioners were clearly prepared and did offer considerable proof, both documentary and oral, in opposition to the government's evidence on this issue" (Govt's Br. p. 15).

The trouble with his argument is that the government had raised and forced petitioners to litigate a false issue. Nor is it correct to say that petitioners were not surprised or that they were "clearly prepared" to meet the prosecutor's unfounded accusation. The fact is that petitioners were taken by surprise; and were it not for a fortuitous four-day recess after the government rested its case, petitioners could not have gathered the documentary proof necessary to reveal the baselessness of the prosecutor's charge. Thus, the dates that appear on defense Exhibits A and A9 show that they were obtained from the Corporation Commission in Virginia on February 20, 1959 (R. 167a, 196a; photo copies were submitted to the court below).

As to the government's further contention that the error was harmless because the court ultimately charged the

jury "to disregard the entire evidence on this matter" (Govt's Br. p. 15), it suffices to say that instructions are easy to give but hard to follow. They could not erase the prejudice and confusion created during a substantial part of the trial.

4.

The government contends that sentence was required to be imposed under the general subornation of perjury statute (18 U. S. C. §1622) and not under Part II of the Interstate Commerce Act (49 U. S. C. §§322(a) and (c)). It argues that Congress did not see fit to include, in the subornation statute, as it did in the perjury statute (18 U. S. C. §1621), the qualifying phrase "except as otherwise expressly provided by law," and that "even if the exception clause were read into the subornation statute, neither perjury nor subornation penalties are 'expressly' provided in the Interstate Commerce Act" (Govt's Br. p. 16).

These contentions overlook the requirement that "even penal provisions must be 'given their fair meaning in accord with the evident intent of Congress'." *Rainwater* v. *United States*, 356 U. S. 590, 592-593. Congress has provided a lesser punishment for any knowing, willful, or otherwise fraudulent attempt to evade or defeat the regulation of motor carriers by means of "any false statement or representation, or by the use of any false * * * affidavit, deposition * * * or by any other means or device" (49 U. S. C. §322(c)). These provisions are broad enough to prohibit oral and written perjury committed before the

Interstate Commerce Commission, and hence to require the punishment therein provided.*

Thus, it has been held that where perjury or subornation of perjury is committed before the Interstate Commerce Commission, the lesser punishment provided by the Interstate Commerce Act must be applied, even though the prosecution was brought under the general perjury or subornation provisions of Title 18. *Epstein* v. *United States*, 196 Fed. 354, 356 (7th Cir.); *Morris Plan Industrial Bank* v. *Finn*, 149 F. 2d 591, 592 (2d Cir.). It should also be noted that this Court left the question open in *Hammer* v. *United States*, 271 U. S. 620, 625.

Petitioners' position is further supported by the Congressional intention not only to limit the punishment of all violations of the Motor Carrier Act to the imposition of fines, but also by the enactment of a comprehensive misdemeanor provision in Section 322(a) to cover any violation "for which the penalty is not *otherwise herein provided*".** Section 322(a) clearly rejects the punishment of any other criminal statute for a similar violation. *United States* v. *Beacon Brass Company*, cited by the government is completely inapposite because Section 145(b) of the Internal Revenue Code provided that the penalties in that

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* In *United States* v. *Beacon Brass Company*, 344 U. S. 43, 45-46, this Court held that a willful attempt to evade a tax in any manner was broad enough to include a perjury in a tax return. Similarly, here, an attempt to evade or defeat the provisions of the Motor Carrier Act by means of any false statement or oral and written perjury would be broad enough to include the present charge.

** See Statement of Senator Wheeler, author of the Motor Carrier Act of 1935, and Statement of Commissioner Eastman, both appearing on pages 18-19 of the petition herein; Statement of Mr. Chief Justice Warren in *Brown* v. *United States*, 359 U. S. 41, 56 (1959).

Section should be "in addition to other penalties provided by law."

Finally, the government's reference to the statement of a sub-committee of the Congress some 22 years after the enactment of the Motor Carrier Act of 1935 does not offer any reliable guide to what Congress earlier intended. Recently in *United States* v. *Price*, — U. S. —, 80 S. Ct. 326, 332 (1960), this Court stated that to infer an earlier Congressional intent by the views of a subsequent Congress was a "hazardous basis".

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 25, 1960.